1988

Paul Lichtefeld v. Jerry Cutshaw, individually and dba Interiors Contracting; Max J. Smith, an individual; and Max J. Smith and Associates, Inc., a Utah corporation : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

PAUL LICHTEFELD,

Plaintiff/Appellant,

vs.

JERRY CUTSHAW, individually and dba INTERIORS CONTRACTING; MAX J. SMITH, an individual; and MAX J. SMITH AND ASSOCIATES, INC., a Utah corporation,

Defendants/Respondents.

Docket No. 880124

Category No. 14 b

BRIEF OF APPELLANT

APPEAL FROM THE ORDER OF DISMISSAL OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

HONORABLE JOHN A. ROKICH, JUDGE

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THE STATEMENT OF THE CASE

A. NATURE OF THE CASE:

This is a negligence action filed by the plaintiff Paul Litchefeld against defendants Jerry Cutshaw dba Interior Contracting and Max J. Smith and Max J. Smith & Associates, Architects. It is alleged in plaintiff's complaint that the defendants were negligent in the construction and inspection of the plaintiff's cabin located near Guardman Pass, Wasatch County, Utah. On April 6, 1986 the roof of the cabin collapsed. The cabin, contents, furnishings, and personal property were all damaged. The damages to the structure and the contents amounted to $127,645.29. It is alleged by the plaintiff that the negligence of the defendants was the proximate cause of plaintiff's damages.

B. STATEMENT OF FACTS

On or about April 6, 1986 the plaintiff, Paul Litchefeld was the owner of the schick-son cabin near Guardman Pass, Wasatch County, Utah. The roof on the cabin collapsed. The cabin, contents, furnishings, and personal property were all damaged. The damages to the structure and the contents amounted to $127,645.29. (R. 3-4).

As a result of the collapse of the cabin roof, the plaintiff commenced a lawsuit against the defendants for

negligence in construction and inspection of the cabin. (R. 12-5).

In response to the plaintiff's summons and complaint, the defendants filed a Motion to Dismiss and a supporting Memorandum, together with affidavits of Max A. Smith and Jerry Cutshaw. (R. 16-31)

The defendants' Memorandum in Support of their Motion to Dismiss, raises Utah Code Ann. Section 78-12-25.5 (1953 as amended) as a defense to the plaintiff's claim. That section prevents recovery of damages from any person on the account of "furnishing the design, planning, supervision of construction or construction of such improvements to real property more than seven years after the completion of construction." (R. 25)

The cabin was substantially completed by Thanksgiving, 1978. The collapse of the cabin occurred on April 6, 1986 which was approximately 4 and a half months after the seven year statutory period of repose had expired. (R. 2-4 and 19 -22)

Oral argument was held in the Third Judicial District Court on December 10, 1987. On February 11, 1988 Judge John A. Rokich issued a memorandum decision granting defendants' Motion to Dismiss. He stated in part ". . .however, the court believes that plaintiff's case is not without merit. The court has reservations about its ruling but will follow precedent of the

present Utah Case law." (R. 101-104) (emphasis in original)

The Order of Dismissal was signed on March 8, 1988 by Judge John A. Rokich, and Notice of Appeal was filed by plaintiff on March 30, 1988. (R. 113-116)

STATEMENT OF ISSUES

1. Does the Utah Architects and Builders Statute of Repose, Utah Code Ann. § 78-12-25.5 (1953 as amended) violate the U.S. Const. amend. XIV, § 1 by depriving plaintiff equal protection of laws?

2. Does the Utah Architects and Builders Statute of Repose, Utah Code Ann. § 78-12-25.5 (1953 as amended) violate the Utah Const. art. I, § 2 and art. I, § 24 by depriving plaintiff equal protection of laws?

3. Does the Utah Architects and Builders Statute of Repose, Utah Code Ann. § 78-12-25.5 (1953 as amended) violate the Utah Const. art. I, § 11 by depriving plaintiff access to courts and redress of injuries?

4. Does the Utah Architects and Builders Statute of Repose, Utah Code Ann. § 78-12-25.5 (1953 as amended), violate the Utah Const. art. VI, § 26 forbidding special laws or legislation?

5. Does the Utah Architects and Builders Statute of Repose, Utah Code Ann. § 78-12-25.5 (1953 as amended) violate the

Utah Const. art. VI, § 23 requiring that only one subject to be clearly expressed in the Statutory Title?

DETERMINATIVE STATUTE

The following statute should be considered when determining a resolution of this action:

Laws of Utah 1967, Chapter 218, Utah Code Ann. § 78-12-25.5, (1953 as amended).

SUMMARY OF ARGUMENTS

Appellant contends that the District Court erred in relying on Good vs. Christensen, 527 P.2d 223 (Utah 1974) which impliedly upholds the constitutionality of Utah Code Ann. § 78-12-25.5 (1953 as amended). In Berry vs. Beech Air Craft, 717 P.2d 769 (Utah 1985), the Utah Supreme Court found the Products Liability Statute of Repose unconstitutional because it violated the Utah Const. art. I, § 11 and art. XVI, § 5. The Utah Supreme Court should also find that Utah Code Ann. § 78-12-25.5 (1953 as amended) is unconstitutional in light of the Berry decision.

Utah Code Ann. § 78-12-25.5 (1953 as amended) also violates U.S. Const. amend. XIV, § 1 and Utah Const. art. I § 2 and § 24 by depriving plaintiff equal protection of laws. The appellant contends the class of people that are similarly situated are architects, contractors, engineers, materialman,

suppliers, laborers and owners. The above individuals are all similarly situated since they all have major roles in the completion of an improvement to real property. It is unreasonable to classify contractors, architects and engineers differently from materialman, suppliers, laborers, and owners. It is unreasonable to confer a grant of immunity from suit to contractors, architects, and engineers while not conferring the same privileges to materialman, suppliers, laborers and owners.

The appellant contends that Utah Code Ann. § 78-12-25.5 (1953 as amended) is unconstitutional violating the Utah Const. art. I, § 11 depriving appellant access to court and redress of injuries. The Utah Const. art. I, § 11 was relied upon by the Utah Supreme Court in striking Utah's Product Liability Act. The appellant has been denied access to the courts of Utah since period of repose had lapsed before the appellant knew he had a cause of action.

Utah Code Ann. § 78-12-25.5 (1953 as amended) is unconstitutional since it violates the Utah Const. art. VI, § 26 forbidding special laws or legislation. The appellants are given an immunity from suit not granted other individuals. The above statute singles out architects, contractors and engineers and gives them preferential treatment.

Finally, Utah Code Ann. § 78-12-25.5 (1953 as amended) is unconstitutional violating the Utah Const. art. VI, § 23 which requires that only one subject be clearly expressed in the Statutory Title of legislation.

POINT I

UTAH CODE ANN. SECTION 78-12-25.5 (1953 AS AMENDED) DOES NOT ACT AS A LIMITATION TO AN OWNER OR PERSON IN ACTUAL POSSESSION OF THE PROPERTY

The plain language of the statute indicates that it is not to act as a limitation or apply to any person in actual possession or control as the owner of the property. The last two paragraphs of Utah Code Ann. § 78-12-25.5 (1953 as amended) state as follows:

> ". . . the limitation imposed by this provision shall not apply to any person in actual possession and control as owner, tenant or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury for which it is proposed to bring an action.
>
> This provision shall not be construed as extending or limiting the period otherwise prescribed by laws of this State for the bringing of any action."

These last two paragraphs have not been interpreted by the courts of Utah to the best of the appellants knowledge. Since the appellant, Paul Lichtefeld, was the actual owner of the cabin and property when the roof collapsed, it is clear that the

limitation imposed by Utah Code Ann. § 78-12-25.5 (1953 as amended) should not be applicable to him. The clear language of the statute states it should not be "construed as extending or limiting the period otherwise prescribed for the bringing of any action." The normal statutory period prescribed by law is found in Utah Code Ann. § 78-12-26 (1953) and is three years. This is the statutory period which the court should follow. Utah Code Ann. 78-12-26 (1953) is the appropriate statute to reference since damage occurred to the owner not a third party. If Utah Code Ann. Section 78-12-25.5 (1953 as amended) is referenced, then the owner is left without a party to sue for redress of injuries, since immunity is granted to designers and planners.

Therefore, the limitation imposed by this statute should not bar the appellant from pursuing a cause of action against the architect, contractor or related parties. Appellant commenced his cause of action timely had the normal statute of limitation been followed, namely Utah Code Ann. § 78-12-26 (1953). Consequently, this court should direct this case back to the District Court reversing Honorable Judge John A. Rokich's Order of Dismissal.

POINT II

THE DISTRICT COURT ERRED IN RELYING ON GOOD VS. CHRISTENSEN WHICH IMPLIEDLY UPHOLDS THE CONSTITUTIONALITY OF UTAH CODE ANN. 78-12-25.5 (1953 AS AMENDED)

Good vs. Christensen, 527 P.2d 223 (Utah 1974) did not involve any constitutional analysis of Utah Code Ann. § 78-12-25.5 (1953 as amended). In light of the decision of Berry vs. Beech Aircraft, 717 P.2d 670 (Utah 1985) the pervasiveness of Good vs. Christensen should be seriously questioned.

In Berry v. Beech Aircraft, 717 P.2d 670 (Utah 1985) the Utah Supreme Court addressed the constitutionality of the Utah Product Liability Act. The Utah Product Liability Act and the challenged statute, Utah Code Ann. § 78-12-25.5 (1953 as amended), are Statutes of Repose. The result in Berry was a holding that the Product Liability Statute of Repose was unconstitutional, since it violated Utah Const. art. I, § 11 and art. XVI, § 5. The statute provided that Products Liability actions were barred if filed more than six years after the date of initial purchase of the product or ten years after the date of its manufacture despite the date of injury. The courts analysis in Berry vs. Beech Aircraft, 717 P.2d 670 (Utah 1985) is applicable to the Architects and Builders Statute of Repose found

in Utah Code Ann. § 78-12-25.5 (1953 as amended). It too should be found unconstitutional.

A Statute of Repose is not designed to allow an individual a reasonable amount of time to file a lawsuit. Indeed, as explained in Berry vs. Beech Aircraft, 717 P.2d 670 (Utah 1985) the Court stated:

> ". . . the Statute of Repose may bar the filing of a lawsuit even though the cause of action did not arise until after it was barred and even though the injured person was diligent in seeking a judicial remedy." Berry at 672.

The collapse of the appellants roof, which gives rise to this lawsuit, occurred approximately four and a half months after the period of repose had expired. This lawsuit was commenced approximately a year and a half after the collapse of the roof. This was timely if the normal statutory period in Utah Code Ann. § 78-12-26 (1953 as amended) (3 years) were found applicable.

Finally, this Court stated in Berry vs. Beech Aircraft, 717 P.2d 670 (Utah 1985) when reflecting on the analysis in Good vs. Christensen, 527 P.2d 223 (Utah 1974) and held as follows:

> ". . . In sustaining the statute, the Court declined to make any analysis of the constitutional claims raised. It simply made the conclusionary statement that the attack on the constitutionality of the statute was without merit. Whether the Court in fact addressed the merits of Utah Const. art. I, §

> 11 is speculative, and the ruling, therefore, has little pervasive effect here."

Berry vs. Beech Aircraft, 717 P.2d at 683.

As will be shown, Utah Code Ann. § 78-12-25.5 (1953 as amended) also violates state and federal constitutional guarantees.

POINT III

UTAH CODE ANN. § 78-12-25.5 (1953 AS AMENDED) IS UNCONSTITUTIONAL AND VIOLATES U.S. CONST. AMEND. XIV, § 1 BY DEPRIVING APPELLANT EQUAL PROTECTION OF LAWS

Before the challenged statute can be found unconstitutional as a violation of equal protection under the state or the federal constitution, it must first be determined under what standard of review the legislation is scrutinized. It may appear that the mere rationality test, which is the least probing standard of review, would apply to statutes such as the challenged statute, since it is not based upon "suspect classifications." However, the U.S. Supreme Court has developed a mid level review or test for classifications, for example, based on gender or illegitimacy. Craig vs. Boren, 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed.2d 397 (1976). Appellant suggests that in cases involving access to judicial process, more probing scrutiny should be used other than "mere rationality". Access to judicial process should be scrutinized closer than economic

issues, which are usually subject to mere rationality. However, as will be shown, other State Supreme Courts have stricken similar statutes using the mere rationality test. Whether using the mere rationality test or a higher theory of review, the challenged statute does not pass constitutional muster.

One of the first cases to strike a statute similar to Utah's on Equal Protection grounds was Skinner vs. Anderson, 231 N.E.2d 588 (Ill. 1967). The Illinois Supreme Court struck down a statute which prohibited an action being filed against any person who performed or was furnishing "the design, planning, supervision of construction or construction of improvements to real property if more than four years have passed since the furnishing of the services." The reasoning of the Skinner court was so persuasive that most courts cite to it as the the seminal decision. The theory of the case was quoted in Phillips vs. ABC Builders, Inc., 611 P.2d 821 (Wyo. 1980), State Farm and Casualty Company vs. All Electric, Inc., 660 P.2d 995 (Nev. 1983); Henderson Clay Products vs. Edgar Wood, 451 A.2d 174 (N.H. 1982), Broome vs. Truluck, 421 S.E.2d 739 (S. C. 1978); Loyal Order of Moose, vs. Cavaness, 563 P.2d 143 (Okla. 1977). Many courts have found the language of Skinner vs. Anderson, 231 N.E.2d 588 (Ill. 1967) to be so persuasive that they have quoted

a substantial portion of that decision verbatim. Any attempts to condense the highlights of Skinner will necessarily result in a loss of meaning and clarity. Therefore, it also merits inclusion here:

> ". . .If, as the defendant suggests, the objective of the statute is to require that trials of actions based upon defects in construction be held within a relatively short time after the work is completed, that objective is achieved only partially, and in a discriminatory fashion. If the damage or injury occurs at any time within 4 years after construction is completed, the time within which the action must be commenced is governed by other statutory limitations. In such cases the time between completion of construction and the required institution of suit may well exceed 4 years.
>
> More important is the fact that of all those whose negligence in connection with the construction of the improvement to real estate might result in damage to property or injury to person more that 4 years after construction is completed, the statute singles out the architect and the contractor, and grants them immunity. It is not at all inconceivable that the owner or person in control of such an improvement might be held liable for damage or injury that results from a defective condition for which the architect or contractor is in fact responsible. Not only is the owner or person in control given no immunity; the statute takes away his action for indemnity against the architect or contractor.
>
> The arbitrary quality of the statute clearly appears when we consider that architects and contractors are not the only persons whose negligence in the construction of a building or other improvement made on damage to

> property or injury to persons. If, for example, 4 years after a building is completed a cornice should fall because the adhesive used was defective, the manufacturer of the adhesive is granted no immunity. And so it is with all others who furnish materials used in constructing the improvement. But if the cornice fell because of defective design or construction for which an architect or contractor was responsible, immunity is granted. It cannot be said that one event is more likely than the other to occur within 4 years after construction is completed.
>
> Of course, section 22 of art. IV does not prohibit legislative classification. It does, however, require that the classification be reasonably related to the that legislative purpose. And where the relationship was non existent the statute has been held to countervene the constitutional provision. (Citations omitted.) That the statutes benefits all architects and construction contractor is significant if the benefits conferred upon them are not denied others similarly situated. As this article held with respect to the section 22 of art. IV that the statute operates uniformly upon all members of a class created as the beneficiaries of the act is not the full test to be applied, but in order to avoid the constitutional inhibition last above quoted it must also appear that there is a sound basis, in reason and principal, for regarding the class of individuals as a distinct and separate class for the purpose of the particular legislation." Skinner v. Anderson, 231 N.E.2d at 590, 591. (emphasis added)

Probably the most significant statement in Skinner is the portion emphasized where the court discusses the possibility that an owner or person in control of an improvement may be held

liable for damage or injury that results from a defective condition for which the architect or contractor is in fact responsible. This is the exact scenario that the appellant advances before this court. The report of Arnold W. Coon (Addendum 1), indicates that in his opinion the roof of the cabin was not constructed according to design specifications. Furthermore, the deviations from the specifications were of such a nature that the architect should have noticed the deviations through periodic walk through inspections of the premises. Consequently, if the challenged statute is not found unconstitutional, the owner will be held responsible for the contractors and architect's negligence when in fact, the owner (appellant) had no reason to believe that the roof and structure were unsound. No rational argument can be advanced that the appellant should be held responsible for the latent defects.

Also, no rational argument can be advanced to support the proposition that owners, tenants, materialman, suppliers, and laborers should be a separate class from architects, engineers and construction contractors. All these individuals play important roles in constructing an improvement to real property.

Many courts have suggested distinctions to justify the separate classifications. First, it is argued that owners, tenants and materialman have continuing control over access to

and maintenance of the property. Klein vs. Catalano, 437 N.E.2d 514 (Mass. 1982), Freezer Storage vs. Armstrong Cork, 382 A.2d 715 (Pa. 1978).

Next, the courts also point to the different treatment of owners and tenants at common law; such as the larger class of potential plaintiffs who may sue design professionals; the legal theories available to those plaintiffs; and the common law defenses available only to landlords and tenants. Freezer Storage, 382 A.2d at 718-720. Others cite the possibility of defective maintenance and alterations. Yarbow vs. Hilton Hotels, 655 P.2d 822 (Colo. 1982).

Other justifications are also cited to support the distinction between owners, suppliers, materialmen and design professionals. One argument is that, because materialmen provide standard goods manufactured by standard processes, they may be held to higher quality control standards than the design professional, whose work is often unique and cannot be completely tested. Klein, 437 N.E.2d 524; Freezer Storage, 328 A.2d at 719. In other words, buildings are more complex than their component parts. Furthermore, design professionals have special expertise; they should be encouraged to experiment in their creativity and should not be stifled. Klein, 437 N.E.2d at 524; O'Brien vs. Hazelet and Erdal, 299 N.W.2d 336 (Mich. 1980).

None of these diverse rationals are persuasive. One effect of the statute of repose is to eliminate the statutory right of contribution among tortfeasors. It follows that when an unprotected owner is 50% at fault and a protected contractor is 50% at fault, the unprotected owner would be 100% liable for all damages, without a remedy for contribution. The statute of repose, therefore, does not entirely abrogate liability for defective design, but shifts it. Thus the potential interest of joint tortfeasors in obtaining contributions, in addition to the claimants interest in suing a particular party, must be considered. Since the owner had no knowledge of any latent defects, its not reasonable or rational that he should be liable for them.

The Supreme Court of Alaska in Turner Construction Co. vs. Scales, 752 P.2d 467 (Ala. 1988) examined the above arguments in detail. In striking the Alaska statute, which is similar to Utah Code Ann. § 78-12-25.5 (1953 as amended), that court held:

> "There is no substantial rational between exempting design professionals from liability, shifting liability for defective design and construction to owners and material suppliers, and the goal of encouraging construction. The shift of liability to unprotected parties increases their incentive to build in corresponding measure to the increased incentives of protected parties. If anything, the dis-

> incentive on the part of owners may be greater than their portional measure of liability shift, because they may be liable for a product over which they have no control. Moreover, design defects may be catastrophic, and experimental designs shift correspondingly greater unknown risk to owners, giving them even more reason not to finance construction. Thus, we believe that the statutory means are not substantially or relationally related to the ends. We conclude that A.S. 09.10.055 violates the equal protection clause of the Alaska Constitution." Turner Construction Co. v. Scales, 762 P.2d at 472.

Many courts have stricken similar statutes on federal equal protection grounds. They are: McClanahan vs. American Gilsonite, 494 F. Supp. 1334 (D. Colo. 1980), State Farm Fire and Casualty Co., vs. All Electric, Inc., 660 P.2d 995 (Nev. 1983), Henderson Clay Products, Inc. vs. Edgar Wood and Associates, Inc. 451 A.2d 174 (N.H. 1982), Phillips vs. ABC Builders, Inc., 611 P.2d 821 (Wyo. 1980), Broome vs. Truluck, 241 S.E.2d 739 (S.C. 1978), Loyal Order of Moose, vs. Kavness, 563 P.2d 143 (Okla. 1977), and Fujioka vs. Kam, 514 P.2d 568 (Haw. 1973) and Shibuya vs. Architects Hawaii LTD, 647 P.2d 276 (Haw. 1982).

Consequently, it is clear that similarly situated people are not being treated similarly. Whether examining the constitutionality of challenged statute under mere rationally or a higher theory of review, the statute fails to pass constitutional muster.

POINT IV

UTAH CODE ANN. § 78-12-25.5 (1953 AS AMENDED) IS UNCONSTITUTIONAL AND VIOLATES UTAH CONST. ART. I, § 2, AND ART. I, § 24 BY DEPRIVING APPELLANT EQUAL PROTECTION OF LAWS

The Utah Const. art. I, § 2 states as follows:

> "All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as a public welfare require".

Also, Utah Const. art. I, § 24 states as follows:

> "All laws of a general nature shall have uniform application."

Even though Utah Const. art. I, § 2 uses the language "equal protection" it appears to be a statement of the purpose of government more than a legal standard used to measure governmental action. In Liedtke vs. Schettler, 649 P.2d 80 (Utah 1982), the Utah Supreme Court stated that Utah Const. art. I, § 24 is generally considered the equivalent of the equal protection clause of the U.S. Const. amend. XIV, § 1.

The most recent state to strike a Architect and Builder Statute of Repose was the Supreme Court of Alaska in Turner Construction Co. vs. Scales, 752 P.2d 467 (Ala. 1988) previously cited. In Turner an action was brought against a construction

company when a fire destroyed an apartment complex. The district court ruled that the 6 year Statute of Repose is unconstitutional violating the equal protection clause of the state constitution. The Supreme Court affirmed the district court ruling. The only substantial difference between Alaska statute and Utah's is that the Alaska statute has a 2 year savings clause.

In Turner, the design professionals contended that the injured plaintiff's lack standing to challenge the statute, suggesting that they were not members of the class of unprotected defendants. Furthermore, the design professionals contended that the statute is constitutional.

The court stated as follows on the standing issue:

> "The injured plaintiffs first constitutional claim is based upon the rights of third-parties-potential defendants, such as owners and tenants, who are not protected by the statute. Every court which has addressed the issue has concluded that persons such as the plaintiffs are proper parties to assert this claim, because they are precluded from asserting their own rights against defendants who might otherwise be liable; the statute narrows the group against which recovery is available. McClanahan vs. American Gilsonite, 494 F. Supp. 1334, 1342-44 (D. Co. 1980); Shibuya vs. Architects Hawaii, 647 P.2d 276, 282 (Haw. 1982). The injured plaintiff's interest in invalidating the statute is as great as that of the materialmen or the defendant in possession. Klein vs. Catalano, 437 N.E.2d 514, 523 (1982). We find this reasoning persuasive, therefore, we conclude that the injured plaintiffs have standing to assert the equal

protection." Turner Construction Co. v. Scales, 752 P.2d at 470.

Likewise, the appellant has standing to assert the constitutional challenges raised. He is in fact a member of a class of unprotected plaintiffs, namely other owners. Consequently, there is no standing issue to be addressed.

The Utah Const. art. I, § 24 protects against two types of discrimination. First, the law must apply equally to all persons within a class. Second, the statutory classifications and the different treatment given the classes must be based on differences that have a reasonable tendency to further the objective of the statute. Malan vs. Lewis, 693 P.2d 661, 670 (Utah 1984).

If the relationship of the classification to the statutory objectives are unreasonable or fanciful, the discrimination is unreasonable.

Utah's Architects and Builders statute of repose classifies defendants based on their occupation or the nature of the work they perform. It classifies plaintiffs based on the time of their injury. Neither of these two categories are a suspect class. The right asserted is the interest in suing a particular party, which is not a fundamental constitutional right; nevertheless, the interest in redressing wrongs through the judicial process is a significant one. Wilson vs.

Municipality of Anchorage, 669 P.2d 569, 572 (Ala. 1983).

The Supreme Court in recent years appears to have altered the standard of review for regulating the exercise of a fundamental constitutional right. In many cases, the Court still maintains that it will employ strict scrutiny when the government allocates the ability to exercise fundamental rights differently among various classifications of persons. The identification of a right as "fundamental" is a substantive decision unrelated to equal protection or technical standards of review. However, the court in the 1960's and early 1970's had indicated that laws making differentiations between persons exercising fundamental rights would be subject to strict judicial scrutiny and would not be upheld unless the government could demonstrate that it was necessary for it to use the classification in order to promote a compelling state interest. Loving vs. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed.2d 1010 (1967) (marriage); Kramer vs. Union Free School District, 395 U.S. 621, 89 S. Ct. 1886, 23 L. Ed.2d 583 (1969) (voting); Shapiro vs. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed.2d 600 (1969) (interstate travel); Dunn vs. Blumstein, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed.2d 274 (1972) (travel and voting).

As a consequence, access to the Courts of Utah and redress of injuries as constitutionally guaranteed in the Utah

Const. art. I, § 11 should at least be subject to the mid level standard of review. Craig vs. Boren, 429 U.S. 190, 197; 97 S.Ct. 451, 50 L. Ed.2d 397 (1976). The court should find that there is no substantial reason for the exempting design professionals from liability while failing to protect owners, materialman and suppliers who are similarly situated. No important governmental objective can be served by making such a discriminatory classification. Consequently, this court should hold Utah Code Ann. § 78-12-25.5 (1953 as amended) unconstitutional as did the Supreme Court of Alaska in Turner Construction Co. vs. Scales, 752 P.2d 467 (Alaska 1988).

In Henderson Clay Products vs. Edgar Wood, 451 A.2d 174 (N.H. 1982) the owner of a shopping mall brought an action against a supplier of bricks alleging the bricks on the department store were peeling, falling apart and generally disintegrating. The Superior Court granted the motion to dismiss and the supplier appealed. The Supreme Court reversed the Superior Court. The substance of the plaintiffs claim, simply stated, is that materialman and suppliers of labor have a six year statute of limitation which begins to run upon discovery of the cause of action, while architects are relieved from liability six years after the performance of their services irrespective of the fact that the cause of action is not discovered until later.

What becomes a six year statute for one group does not necessarily become a six year statute for the other. The Court in Henderson stated as follows:

> "The statute under consideration here has set up a classification whereby architects and contractors are singled out for protection not granted to materialman or the suppliers of labor. It is difficult to rationally permit a situation to exist whereby the supplier of labor and material has a liability exposure for a period of six years after the injury has been discovered or, in the exercise of due care, should have been discovered when, at the same time, the designers of the premises can be immunized from the liability before the cause of action even occurs or can be factually asserted." Henderson at 175.

Finally, the court in Henderson vs Edgar Wood, 451 A.2d 174 (N.H. 1982) correctly reasoned that materialman and suppliers are part of the same class as architects and builders. The court held:

> "In the construction of an ordinary building, whether modest or substantial, there are necessarily involved many differing talents, services and supplies. The end product is the result of collective judgments and collective efforts. If there is fault inherent in the completed structure as a result of which injury is sustained, it seems fundamentally fair that all those who participate in the enterprise should be held to account for their share of the blame for any negligent acts performed or defective materials supplied and thus stand on the same footing, rather than permit the apportionment of blame to be determined by the fortuity of the timing of the discovery

> of the defect." Id., at 175. (emphasis added)

Applying the rationale of Henderson, it seems rational and sensible that architects, contractors and design professionals along with materialman, suppliers, and owners are all part of the same class. They all offer differing talents, services and supplies and are all working toward the successful completion of the construction project. The end product whether a home or office building is the end result of collective judgments and collective efforts of the individuals. To limit the liability of design professionals at the expense of materialman, suppliers, and owners seems fundamentally unfair and is the type of discrimination that the Utah Const. art. I, § 2 and art. I, § 24 was designed to protect against.

On a number of occasions, the Supreme Court of Utah has held a statute unconstitutional because it does not operate uniformly on the members of a class. In State Tax Commission vs. Department of Finance, 576 P.2d 1297 (Utah 1978) the Court held the statute unconstitutional because it singled out the State Insurance Fund from all insurance companies that were found to be within the same class to pay a special tax. The Court stated:

> "Equal protection protects against discrimination within a class. The legislature has considerable discretion in the designation of classification that the Court must determine whether such

> classification operate equally on all persons similarly situated." Id. at 1298.

Furthermore, when persons are similarly situated, it is unconstitutional to single out one person or group of persons from among a larger class on the basis of a tenuous justification that has little or no merit. Malan vs. Lewis, 693 P.2d 661, 671 (Utah 1984). In Dodgetown, Inc. vs. Romney, 480 P.2d 461 (Utah 1971), this Court held unconstitutional a Sunday closing law that required only licensed automobile dealers to close and permitted other business to transact business on Sunday because the discrimination failed to further the legislative purpose of preventing fraud and auto thefts.

Therefore, Utah Code Ann. § 78-12-25.5 (1953 as amended) should be found unconstitutional violating equal protection guarantee's of the Utah Constitution.

POINT V

UTAH CODE ANN. § 78-12-25.5 (1953 AS AMENDED) IS UNCONSTITUTIONAL VIOLATING THE UTAH CONST. ART. 1, § 11 BY DEPRIVING APPELLANT ACCESS TO THE COURTS AND REDRESS OF INJURIES.

The Utah Const. art. I, § 11 is part of the Declaration of Rights. The purpose of this section is to provide all people access to the courts in order to have redress for injuries. This section states as follows:

> "All courts shall be open, and every person, for an injury done to him in person, property

> or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil cause to which he is a party."

As explained in Berry vs. Beech Air Craft, 717 P.2d 670 (Utah 1985), approximately 37 states have constitutional provisions that are similar to Utah's open court provision. There is no similar provision under the Federal Constitution. This provision allows all individuals access to the court based on fairness and equity. The framers of the Utah Constitution intended that individuals cannot be arbitrarily denied access to the courts nor be denied remedies that may be obtained therein.

The Utah Supreme Court in Berry vs. Beech Aircraft, 717 P.2d 670 (Utah 1985) quoted favorably the South Dakota Supreme Court decision of Daugaard vs. Baltic Corporative Building Supply Association, 349 N.W.2d 419, 425 (S. D. 1984) where that court stated:

> "Our constitution is solid core upon which all our state laws must be premised. Clearly and unequivocally, our constitution directs that the courts of this state shall be open to the injured and oppressed. We are unable to view this constitutional mandate as a faint echo to be skirted or ignored. Our constitution is free to provide greater protections for our citizens than are required under the Federal Constitution. . . Our constitution has spoken, and it is our duty to listen."

Berry vs. Beech Air Craft, 717 P.2d at 676. (emphasis added)

Likewise, Utah's Constitution is also free to provide greater protections for it's citizens than are required under the Federal Constitution.

In Jackson vs. Mannesmann Demag Corp., 435 S.2d 725 (Ala. 1983), a person was injured by an electrical arc furnace and brought claims against the corporations on the manufacturer's liability doctrine and on negligence. The Circuit Court entered judgment in favor of the defendant corporations based on the statute of repose regarding improvements to real estate, and an appeal was taken. The Supreme Court held that the statute of repose, Ala. Code § 6-5-218, (1975), regarding improvements to real estate, violated Alabama's open court provision of the State Constitution.

Ala. Code § 6-5-218, (1975), would not allow an action to be commenced against any person performing or furnishing the design, planning, supervision or observation of construction or the construction of an improvement to real property more than seven years after the substantial completion of the improvement. Ala. Code § 6-5-218, (1975), is strikingly similar to Utah's statute of repose being challenged. Previously, Ala. Code Title 7, § 23(1) (supp. 1973) was the statute which preempted Ala. Code Section 6-5-218. Ala. Code Title 7, § 23(1) was found

unconstitutional in Bagby Elevator Electric Co., vs. McBride, 291 S.2d 306 (Ala. 1974). The Alabama Supreme Court in Bagby struck down the seven year limitation as violative of the Alabama Constitutional requirement that a bill's title clearly express its subject and that its body contain only one subject.

In any event, the plaintiff in Jackson v. Mannesmann Demag Corp. 435 S.2d 725 (Ala. 1983) argued that Ala. Code § 6-5-218 (1975) was unconstitutional on the following grounds:

1. The act violated Ala. Const. art. I, § 13 i.e. the open court provision.

2. The act violated the equal protection clauses of the United States and Alabama Constitutions.

3. The method of enactment of Ala. Code § 6-5-218 (1975) violated Section 45 of the Alabama Constitution, requiring that a bill's title clearly express its subject and that its body only contain one subject.

4. The act violated the due process clauses of the United States and Alabama Constitution.

In striking Ala. Code § 6-5-218 (1975) in Jackson, the Alabama Supreme Court relied on Lankford vs. Sullivan, Long, and Hagerty, 416 S.2d 996 (Ala. 1982) where the Alabama Supreme Court ruled that Alabama's product liability statute of repose violated the open court provision of the Ala. Const. art. I § 13.

The statute in Lankford, which was a statute of repose like the one at issue here, not only limited the period of time during which an action could be brought, but also prevented a cause of action from occurring for injuries caused by products which were put into use more than ten years before they caused the injury. Both statutes abolished causes of action theretofore known under Alabama law. The Products Liability Statute abolished causes of action for injury caused by products over ten years old; Alabama's Architects and Builders Statute abolished actions for damages caused by defects in improvements to real property if seven years has expired from completion. The appellees in Jackson vs Mannesmann Demag Corp., 435 S.2d 725, 727, 728 (Ala. 1983) point to three grounds which, they argue, support their contention that Ala. Code § 6-5-218, (1975) unlike the products liability statute, was a legitimate exercise of the states police power and attempt to eradicate a perceived social evil. Jackson vs. Mannesmann Demag Corp., 435 S.2d 725, 727, 728 (Ala. 1983).

First, the appellees argue that buildings and other structures have a relatively long life span vis-a-vis manufactured products. Therefore, appellees argue, the statute was a reasonable attempt to limit what might otherwise amount to an exposure to liability for an unlimited period of time.

Next, the appellees argued that the longer period of

time between the completion of the structure and injury, the greater the opportunity for some intervening negligence to occur.

Finally, the appellees argued that Ala. Code § 6-5-218 (1975) protects against the defendants having to mount the defense with "stale evidence."

The Alabama Supreme Court in Jackson, held that neither of the above three arguments advanced by the appellees were persuasive. In response to these three arguments the Supreme Court in Jackson, cited favorably the decision of Overland Construction vs. Sirmons, 369 S.2d 572 (Fla. 1979) wherein the Supreme Court of Florida, in striking down a similar statute as offensive to that state's "open court" provision in its constitution, replied as follows:

> "We recognize the problems which are inherent in exposing builders and related professionals to potential liability for an indefinite period of time after an improvement to real property has been completed. Undoubtedly, the passage of time does aggravate the difficulty of producing reliable evidence, and it is likely that advances in technology tend to push industries standards inexorably higher. The impact of these problems, however, is felt by all litigants. Moreover, the difficulties of proof would seem to fall at least as heavily on injured plaintiffs, who must generally carry the initial burden of establishing that the defendant was negligent. In any event, these problems are not unique to the construction industry, and they are not sufficiently compelling to justify the enactment of legislation which, without

> providing an alternate means of redress, totally abolishes an injured person's cause of action. The legislation impermissively benefits only one class of defendants, at the expense of an injured parties right to sue, and in violation of our constitutional guarantee of access to court."

Overland Construction vs. Sirmons, 369 S.2d at 574 (Fla. 1979).

Finally, the Supreme Court of Alabama in Jackson vs. Mannesmann Demag Corp., 435 S.2d 725 (Ala. 1983) further supported their decision and held as follows:

> "We rule that the appellees have failed to show a substantial relationship between Ala. Code § 6-5-218 and the eradication of any social evils sufficient to distinguish this case from Lankford. Furthermore, this statute, like the products liability statute of repose, has no "savings clause" to provide parties injured near the expiration of the seven year period the sufficient time to seek redress for their injuries. Under our ruling in Lankford, the failure of such a statute to make some provision for those injured shortly before expiration of the limitations makes the statute arbitrary on its face and can not be upheld. Lankford, at 1003-1004. . . .Because Ala. Code § 6-5-218 contains the same constitutional infirmities as the products liability statute struck down in Lankford, we deem it unnecessary to discuss the appellants additional contention." Jackson at 729.

The same constitutional infirmities found in Berry vs. Beech Aircraft, 717 P.2d 670 (Utah 1985) were also found in Lankford vs. Sullivan, Long and Hagerty, 416 S.2d 996 (Ala. 1982). Likewise, the rational of the Alabama Supreme Court in

striking down the Ala. Code § 6-5-218, (1975), is persuasive and should be followed by this Court in striking down Utah Code Ann. § 78-12-25.5 (1953 as amended). Both Alabama and Utah's statute of repose are similar in their wording and effect. Both statutes close the door to litigants before they knew it was opened. Indeed, since the framers of the Utah Constitution felt that the courts of Utah should be open to all individuals, this constitutional provision and guarantee should not be viewed as a "faint echo". The constitution has spoken, and it is our duty to listen. See also Saylor vs. Hall, 497 S.W.2d 218 (Ky. 1973) and Phillips vs. ABC Builders Inc., 611 P.2d 821 (Wyo. 1980) wherein both Kentucky and Wyoming found similar statutes of repose unconstitutional as a violation of the open court provisions of their individual state constitutions.

POINT VI

UTAH CODE ANN. § 78-12-25.5 (1953 AS AMENDED) IS UNCONSTITUTIONAL VIOLATING THE UTAH CONST. ART. VI, § 26 FORBIDDING SPECIAL LAWS OR LEGISLATION

Utah Const. art. VI, § 26 states in part as follows:

> ". . . In all cases where a general law can be applicable, no special law shall be enacted. . ."

In 1980, the Supreme Court of Wyoming in Phillips vs. ABC Builders, Inc., 611 P.2d 821 (Wyo. 1980) ruled on the constitutionality of Wyo. Stat. § 1-3-111, (1977) which is

Wyoming's Architect and Builder statute of repose.

In Phillips, the plaintiff purchased a home in July 1977, the construction of which was substantially completed on or about May 22, 1969. After heavy rains, the basement and foundation walls began to collapse on or about May 25, 1978. Plaintiffs were forced to vacate the home. On September 19, 1979, plaintiffs filed a complaint in District Court seeking damages from ABC Builders, Inc., which company substantially completed the home on or about May 22, 1969. The district court granted ABC Builders motion to dismiss on the grounds that the statute of limitations had run. The District Court was reversed by the Wyoming Supreme Court which held as follows:

> "We hold that the statute in question, Wyo. Stat. § 1-3-111, supra, is not a statute of limitations, but is a grant of immunity from suit. Its immunity is conferred only on a narrow spectrum of defendants. We hold that there is no rational or reasonable justification for granting this immunity to these limited class of persons. Further, we hold that this statute is a special law which at least to the extent that no special law can be made enacted where a general law can be made applicable. In this instance, a general law can be made applicable. The Wyo. Const., § 7, art. 1 and § 27, art. 3, supra. Moreover, a statute operates so as to close courts to individuals who have had dealings with a protected class in violation of the Wyo. Const., § 5, art. I, supra."

Phillips vs. ABC Builders, Inc., 611 P.2d at 831.

The court in Phillips, like most courts striking

similar statutes, cites favorably the seminal of Skinner vs. Anderson, 213 N.E.2d 588 (Ill 1967). The Illinois court in Skinner found the statute unconstitutional which mirrored the Wyoming statute. Both the Wyoming and Illinois statutes in encompass the essence of Utah statute. The court in Phillips found the reasoning of Skinner to be persuasive also. The important parts of that decision have been previously discussed in Point III, of this brief.

It is obvious that a general law can be made applicable in Utah. For example, the State of Oregon enacted a general statute in 1967, the same year Utah enacted their Architect and Builder statute of repose. It states:

> "In no event shall any action for negligent injury to person or property of another be commenced more than ten years from the date of the act or omission complained of."

Josephs vs. Burns, 491 P.2d 203 (Or. 1971). In this statute, immunity is accorded to every alleged tortfeasor after the passage of ten years.

Utah Code Ann. § 78-12-25.5 (1953 as amended) grants to persons such as the defendants a privilege and immunity as to a particular benefit or advantage denied to other persons, i.e., the right to be free from suit after seven years have past from the completion of any physical improvement to real property. This immunity is not granted to an owner of real property or any

person in control of the property, who makes the improvement. Any person, firm or corporation that owns property is in the same class as the architect or builder, but lacks the immunity granted to the architect or builder. The statute not only denies the owner immunity, it also denies the owner the right to contribution or indemnity. Constitutional muster can not justify the special immunity accorded to the protected class but denies to others similarly situated. The cases relied upon, which fail to find statutes unconstitutional, do not come to grips with the real problem presented; what factors distinguish the favored class so that it requires or deserves immunity not accorded others which appear to be similarly situated. (Kallas Millwork Corp. vs. Square D Company, 225 N.W.2d 454, 460 (Wis. 1975).

Finally, the business of engaging in a construction projects is one clothed with a public interest. Utah Code Ann. § 78-12-25.5 (1953 as amended) makes no provision which protects the interest of owners of property. No reasonable connection is shown between granting special privileges and immunities involved in construction projects and denying them to citizens who own real property upon which improvements are made.

Consequently, Utah Code Ann. § 78-12-25.5 (1953 as amended) should be held unconstitutional as a violation of the Utah Const. art. VI, § 26 forbidding special laws or legislation.

POINT VII

UTAH CODE ANN. § 78-12-25.5 (1953 AS AMENDED) IS UNCONSTITUTIONAL VIOLATING THE UTAH CONST. ART. VI, § 23 OF THE UTAH CONSTITUTION REQUIRING THAT ONE SUBJECT BE CLEARLY EXPRESSED IN THE STATUTORY TITLE

The Utah Const. art. VI, § 23 states in part:

> . . .No bill shall be passed containing more than one subject, which shall be clearly expressed in its title."

Appellant maintains that Utah Code Ann. § 78-12-25.5 (1953 as amended) falls far short of advising members of the legislature or the public that it is not a statute of limitations. Section 25.5 is found under Article II entitled "other than real property." Sections 22 through 25 proscribe different statutory limitations, which are in fact genuine statutes of limitation. However Section 25.5 is not a statute of limitations but a statute of repose. Section 26 through 31.2 are once again normal statutes of limitation. Section 25.5 is placed in the midst of many statutes of limitation.

The title of Section 25.5 is "Injury Due to Defective Design or Construction to Real Property-Within Seven Years." As stated above, this heading falls far short of advising members of legislature or the public that Section 25.5 is not a statute of limitation; that it bars a cause of action before it arises; that it bars a right of action coming into existence if the accident

occurs subsequent to the seven year period. This language would lead members of the legislature and the public to believe that this section would fall within the normal Article II "other than real property" limitation periods. Utah Code Ann. § 78-12-25.5 (1953 as amended) was enacted in 1967 in the midst of a national lobby effort to limit the exposure of architects, contractors and related professionals. In an attempt to limit exposure, the American Institute of Architects, the National Society of Professional Engineers, and the Associated General Contractors of America lobbied for enactment of statutes limiting the period subsequent to the construction of a given improvement during which an action might be brought for injuries allegedly caused by architects or other construction personnel. As a result of their lobbying efforts, numerous states passed statutes associating the accrual of a cause of action in conclusion of construction rather than with a result of injury to the plaintiff. Jackson vs. Mannesmann Demag Corp., 435 S.2d 725, 726 (Ala. 1983).

As with the majority of other states, Utah enacted in 1967 the statute that is now being challenged. The statute cannot pass constitutional muster since the subject of the statute must be clearly expressed in the title. State of Utah vs. Twitchell, 8 Utah 2d 314, 333 P.2d 1075 (Utah 1959), State vs. Barlow, 107 Utah 292, 153 P.2d 647 (Utah 1944), and State vs.

Kallas, 97 Utah 492, 94 P.2d 414 (Utah 1939).

Finally, the Supreme Court of Alabama in Bagby Elevator and Electric Co. Inc. vs. McBride, 291 S.2d 306 (Ala. 1974) struck a statute which is almost verbatim like the Utah Const. art. VI, § 23. The court in McBride, stated as follows with reference to their constitutional provision that the subject be "clearly expressed in the title":

> "The object of the constitutional provision has been held to be three fold, first, to fairly apprise the people, through the publication of legislative proceedings as is usually made, of the subject of legislation that are being considered, in order that they may have the opportunity of being heard thereon, by petition or otherwise, if they shall so desire; second, truly to inform the members of the legislature who are to vote upon the bill, what the subject of it is so that they may not perform that duty, deceived or ignorant of what they are doing; and third to prevent the practice of embracing in one bill several distinct matters, none of which, perhaps could singly obtain assent of the legislature, and procuring its passage by combination of the minorities in favor of each of the measures, into a majority that will adopt them all."

Bagby Elevator and Electric Co. Inc. vs. McBride, 291 S.2d at 308.

The title of Utah Code Ann. § 78-12-25.5 (1953 as amended) does not indicate whether it is a traditional statute of limitation or a statute of repose.

Finally, the Supreme Court in McBride, stated as

follows:

> "It seems clear, however, that when the Title purports to establish a traditional statute of limitations, but the body in fact does something different, not merely in degree but in kind, by declaring, in effect, that no substantive right to bring an action exists seven years after a certain event, then the subject has not been clearly expressed and the purposes of the Title as established by this Court have not been met. Thus, as applied to causes of action accruing more than seven years after completion of the improvement, the act, by virtue of it's defective title, violates Section 45 of the State (Alabama) constitution. McBride, at 309, 310."

Additionally, Utah Code Ann. § 78-12-25.5 (1953 as amended) does not differentiate from other statutes of limitation contained in chapter 12. Most statutes of limitation deal merely with the procedural rights, not with eliminating substantive rights. Section 25.5 effectively eliminates many causes of action before they can actually accrue.

Finally, the Title of Section 25.5 is not any different than the other statutes of limitations contained in Article II. That is, all 25.5 states is that the action should be brought within "seven years." Nothing in the title denotes that this is a statute of repose which deals with substantive rights as opposed to a statute of limitations which deals with procedural rights. Consequently, the Utah Const. art. VI, § 23 has been violated since the challenged statute does not clearly express

its self in a statutory title.

CONCLUSION

UTAH'S PUBLIC POLICY SHOULD NOT ALLOW ARCHITECTS, ENGINEERS, OR CONTRACTORS TO SHIELD THEMSELVES WITH IMMUNITY FROM SUIT

There is no reason to treat architects, engineers, or contractors any different from materialman, suppliers, owners, or tenants. All of these individuals play an important role in the construction of a home, building or improvement to real property.

Here the proximate cause of plaintiff's damages extends from a defect in either the design, planning or construction of the Park City cabin. The report of Arnold W. Coon, P. E., L. S., states that the structure was not built according to design specifications and that the architect could have noticed such deviations through his periodic inspections. Utah's statute in its present form does not promote the building of safe structures or improvements. It has the opposite effect of encouraging short cuts. Design and planning professionals may take cost saving measures which are not anticipated in the design of the structure. The result can be catastrophic to both life and property, as it was to the appellant.

Finally, the open court provision of the Utah Const. art. I, § 11 provides greater protection for its citizens than required under the Federal Constitution. Our Constitution has

spoken and it is our duty to listen. Berry v. Beech Aircraft, 717 P.2d 670, 676 (Utah 1985).

WHEREFORE, the plaintiff requests that the District Court Order of Dismissal be reversed and that Utah Code Ann. § 78-12-25.5 (1953 as amended) be declared unconstitutional on the above stated grounds, and that this case be remanded to the District Court for proceedings consistent with this opinion.

DATED this 15 of August, 1988.

MORGAN, SCALLEY & READING

J. Mark Whimpey

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of August, 1988, I hand-delivered four true and correct copies of the foregoing Supreme Court Brief to:

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_____

ADDENDUM 1

INVESTIGATION OF ROOF FAILURE
AT THE
SCHICK-SUN CABIN
NEAR GUARDSMAN PASS
WASATCH COUNTY, UTAH

ARNOLD W. COON, P.E., L.S.
FORENSIC ENGINEERING
CONSULTING • STRUCTURAL • INVESTIGATIONS
5330 SOUTH 900 EAST SALT LAKE CITY, UTAH 84117 (801) 262-2666

JUNE 1, 1986

Aetna Insurance Company
445 East 4500 South
Salt Lake City, Utah 84107

Attn: Ross Whitlock

Re: Roof failure at Schick-Sun Cabin near Guardsman Pass, Wasatch County, Utah. (86045)

Dear Mr. Whitlock;

At your request, I accompanied you, Max Smith (architect), Leon Tanner (structural engineer) and a contractor in a visit to the above site on Saturday, May 10, 1986. The following is a brief summary of our findings to date.

1. The cabin was designed by Max Smith, architect. His structural consultant was Leon Tanner, with Edmund Allen Engineers. The plans were drawn in August of 1978. Originally, the cabin had a partial basement, main floor, mezzanine and roof. An addition was made to the basement at a later date.

2. The cabin has plan dimensions of 35'-0" by 35'-0". It is divided into four equal quadrants which are each 17'-6" square. An eight inch square steel tubular column is located at each corner of the quadrants. At the roof level, a glulam beam is located along each side of the quadrants. These bear on the steel columns noted above. The clear distance between the glulam beams was to be 16'-8 7/8". Joists, which are spaced at 16 " centers, span between the glulam beams. The orientation of the joist spans changes 90 degrees in adjacent quadrants. The joists are a patented product which is manufactured by Trus-Joist Corporation with headquarters in Boise, Idaho. Their product and service is the "Cadillac" of this type of framing. It consists of a type of open web truss. The top and bottom chords are made of

wood. The diagonal web members are made of round steel tubes which are flattened at their ends. The flattened ends fit into slots which are cut in the chord members. They are permanently attached with steel pins which are tightly fit into holes in the wood and holes in the tubes. Two light steel anges are connected in the end joints of the top chord to provide articulating bearing seats. Trus-Joist also provides wood bearing plates which are to be attached to the tops of the supporting beams. These wood plates have pre-cut slots at the same spacing as the joists. These slots receive the flattened ends of the end web members and allow the bearing angles to fit on top of the beam. This prevents any eccentricity which would cause bending stresses in the top chord which could cause a failure.

3. We have included a portion of the plans which were provided by Trus-Joist for this project. They were careful to provide dimensional information which was compatible with the architect's plans and with the fabrication of the joists. The contractor should have been careful to see that these dimensions were fully complied with. We have noted the actual dimension on these plans

4. At the time the cabin was designed, there was no "official" snow load requirement for Wasatch County. The design snow loads were left up to the discretion of the structural engineer. Trus-Joist provided joists which were capable of carrying a total load of 195 pounds per square foot (psf) with an adequate factor of safety. They broke the total load into a dead load of 25 psf and a snow load of 170 psf. The actual dead load was closer to 15 psf. This would give a reserve for a snow load of 180 psf. Subsequent studies have been unofficially published which give a design snow load of approximately 190 psf. A new publication is about ready for issue which may have some minor revisions to this figure. In any event, it appears that the design loads were certainly within a reasonable range.

5. The contractor built the cabin with greater dimensions between the glulam beams than were called for on the plans. He also appears to have either left the wood bearing plates off, which were provided by Trus-Joist, or he did not install them as shown on the plans. We have included a sketch which shows how they should have been installed and another sketch which shows how they were actually installed. The quadrant which failed was constructed with 5 5/8" too much span. This caused eccentricities in the top chords of the joists which overstressed

them to the point of failure. The other three spans were also too long. Going clockwise around the roof from the failed area, the excess span lengths are 4 7/8", 1 1/8" and 5/8". It is unconscionable that the contractor allowed this to happen without calling his discrepancy to someone's attention.

6. The architect's contract called for him to make periodic visits to the site to see that the contractor was conforming to the plans. The problem in the framing was so obvious that it should have been caught by the architect.

7. The Building Code requires that two roof drains be provided for each draianage area unless scuppers are installed at the walls to prevent the ponding of water on the roof. The architect provided two roof drains; however, he failed to recognize that a "dead flat" roof deflects under load and causes areas which are lower than those over the supporting beams The roof framing also develops some "creep" which causes permanent deflections and low areas which do not drain adequately to the two drains which were provided. Thus, in some areas, greater loads cause greater deflections which in turn create areas of greater load which cause greater deflections, etc. This may have contributed a little to the failure. It would be advisable to put at least one roof drain at the low point of each quadrant.

CONCLUSIONS

1. The primary cause of failure was the contractor's lack of precision in constructing the building to the dimensions shown on the plans which were prepared both by the architect and the supplier of the joists.

2. The architect should have caught the contractor's errors during his inspections of the construction.

3. Of lesser concern is the fact that the architect did not provide enough roof drains at the low points of the roof to properly take care of deflections and creep.

RECOMMENDATIONS

1. Remove the ceiling paneling and insulation as necessary.

2. Replace the joists which have failed.

3. Properly attach new ledgers, with slots for the joist web members, to the sides of the existing glulam beams to provide support for the remaining joists.

4. Install new roof drains as noted above.

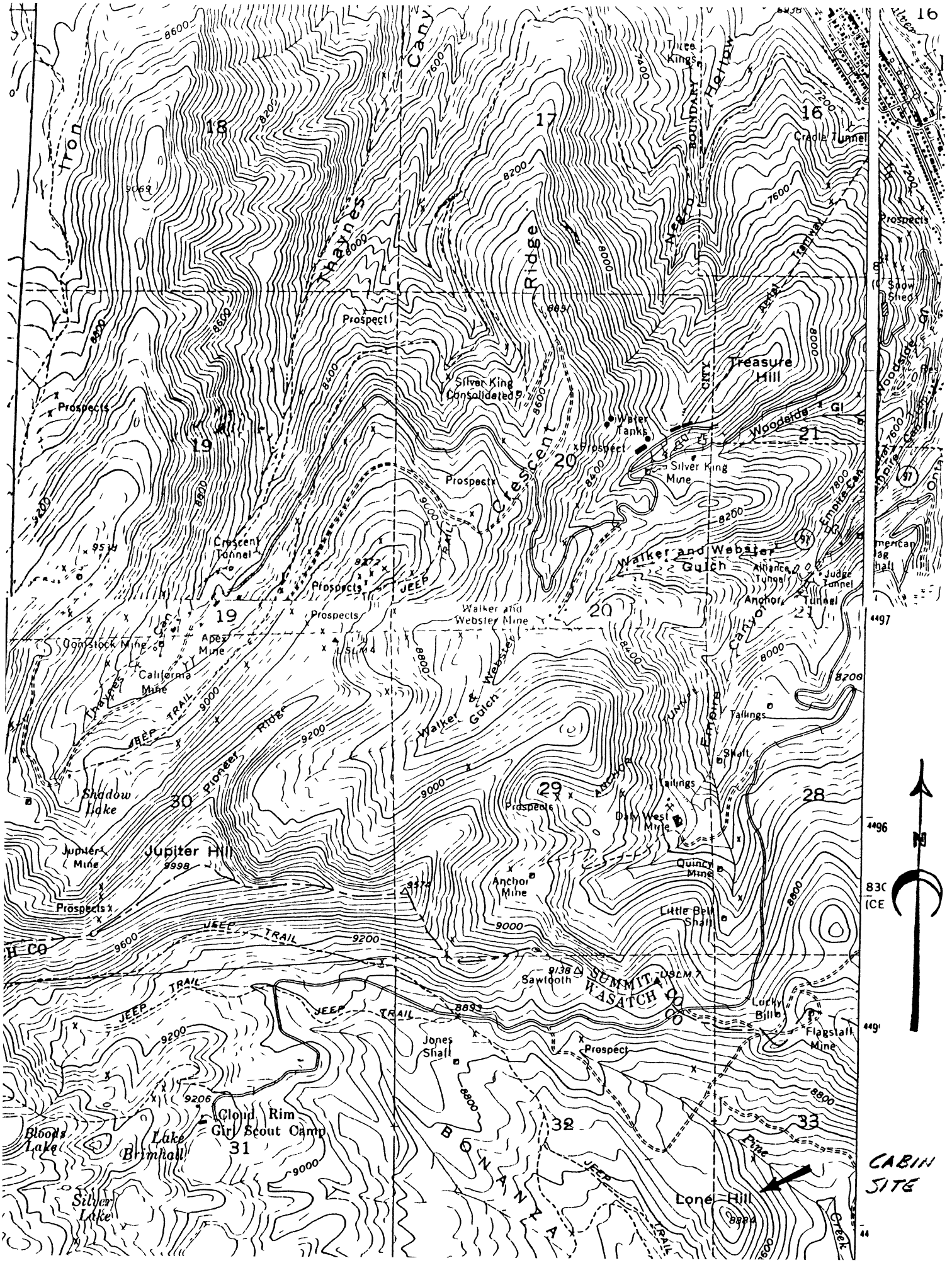
5. Reinstall the insulation and ceiling panels.

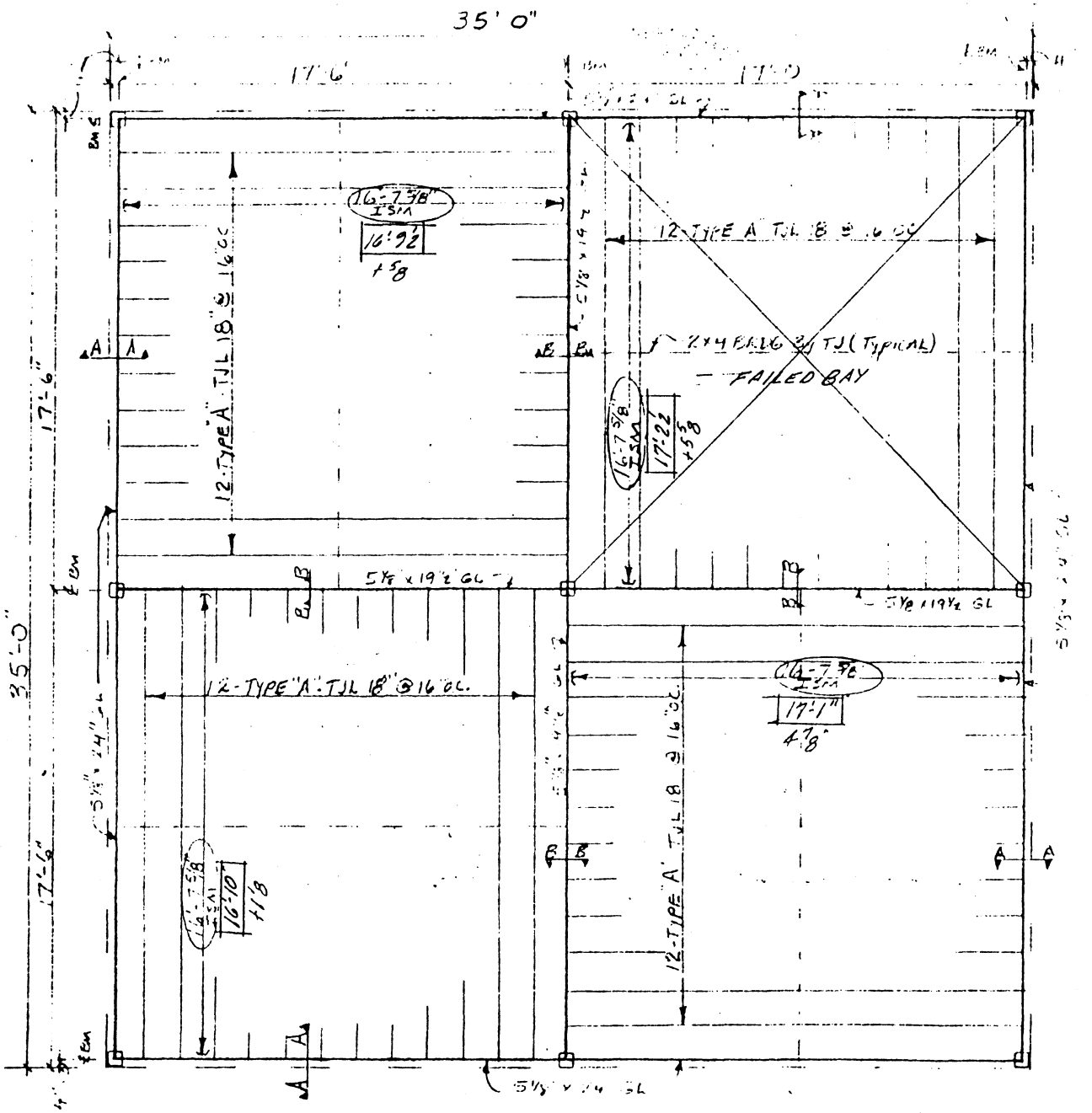
The above work should be designed, coordinated and inspected by the original architect and structural engineer.

If we may be of further service to you, please let us know.

Very truly yours,

Arnold W. Coon, P.E., L.S., ACEC


Iron
Canyon
Thayne's
Ridge
Crescent
Boundary
Hollow
Treasure Hill
Silver King Consolidated
Silver King Mine
Water Tanks
Prospect
Prospects
Crescent Tunnel
Walker and Webster Gulch
Walker and Webster Mine
Alliance Tunnel
Judge Tunnel
Anchor Tunnel
Comstock Mine
Apex Mine
California Mine
Thayne's Canyon Trail
Jeep Trail
Pioneer Ridge
Shadow Lake
Jupiter Hill
Jupiter Mine
Anchor Mine
Quincy Mine
Little Bell Shaft
Lucky Bill
Flagstaff Mine
Dan West Mine
Tailings
Shaft
Sawtooth
Summit
Wasatch Co
Jones Shaft
Cloud Rim Girl Scout Camp
Bloods Lake
Lake Brimhall
Silver Lake
Bonanza
Lone Hill
Pine
Creek
Woodside Gl
Empire Canyon
Cradle Tunnel
Tunnel
Snow Shed
CABIN SITE



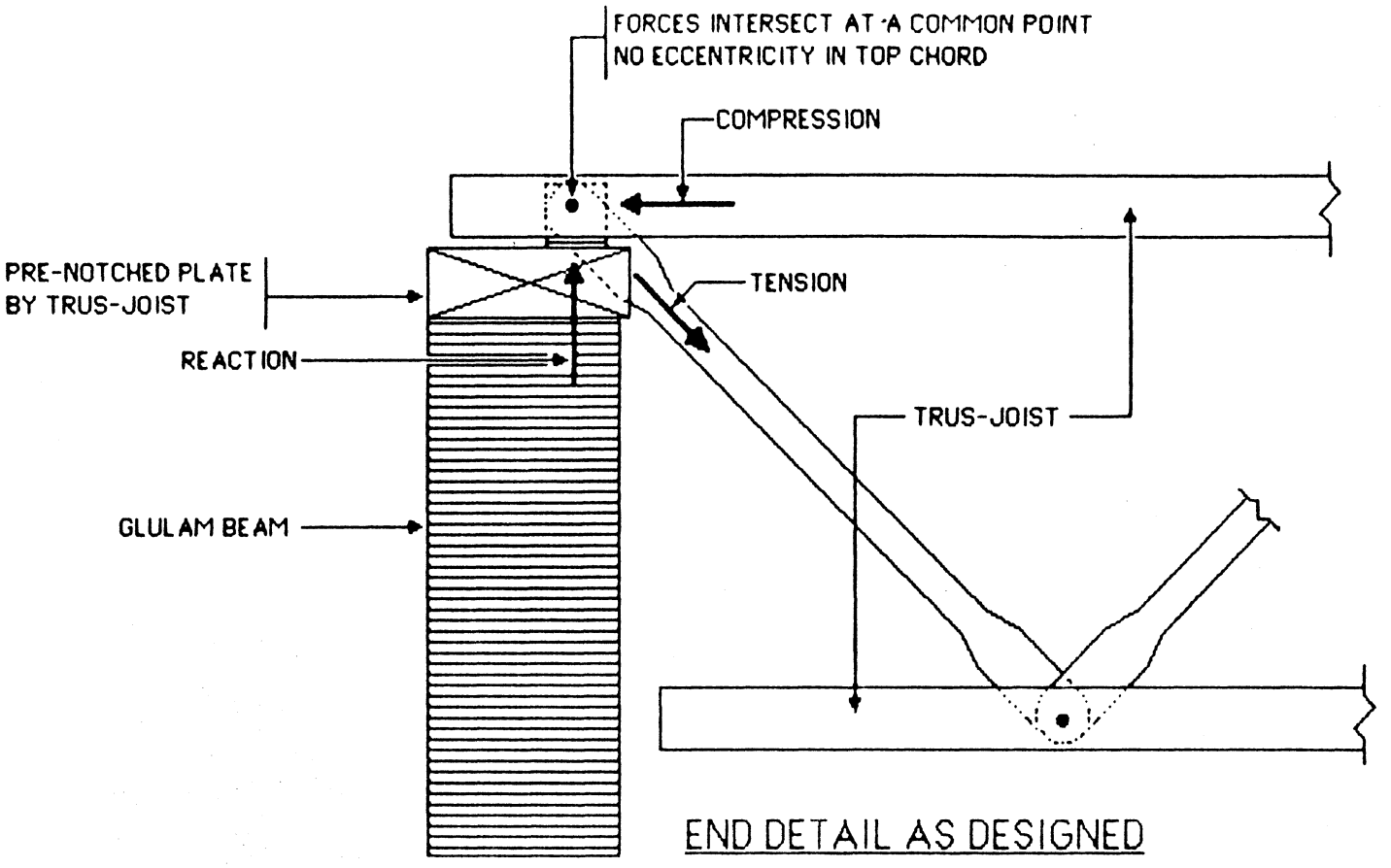
ROOF FRAMING PLAN

- MTD. BY CONTR.
- 2X4 BLOCK WITH H CLIPS ATTACHED BY TJ

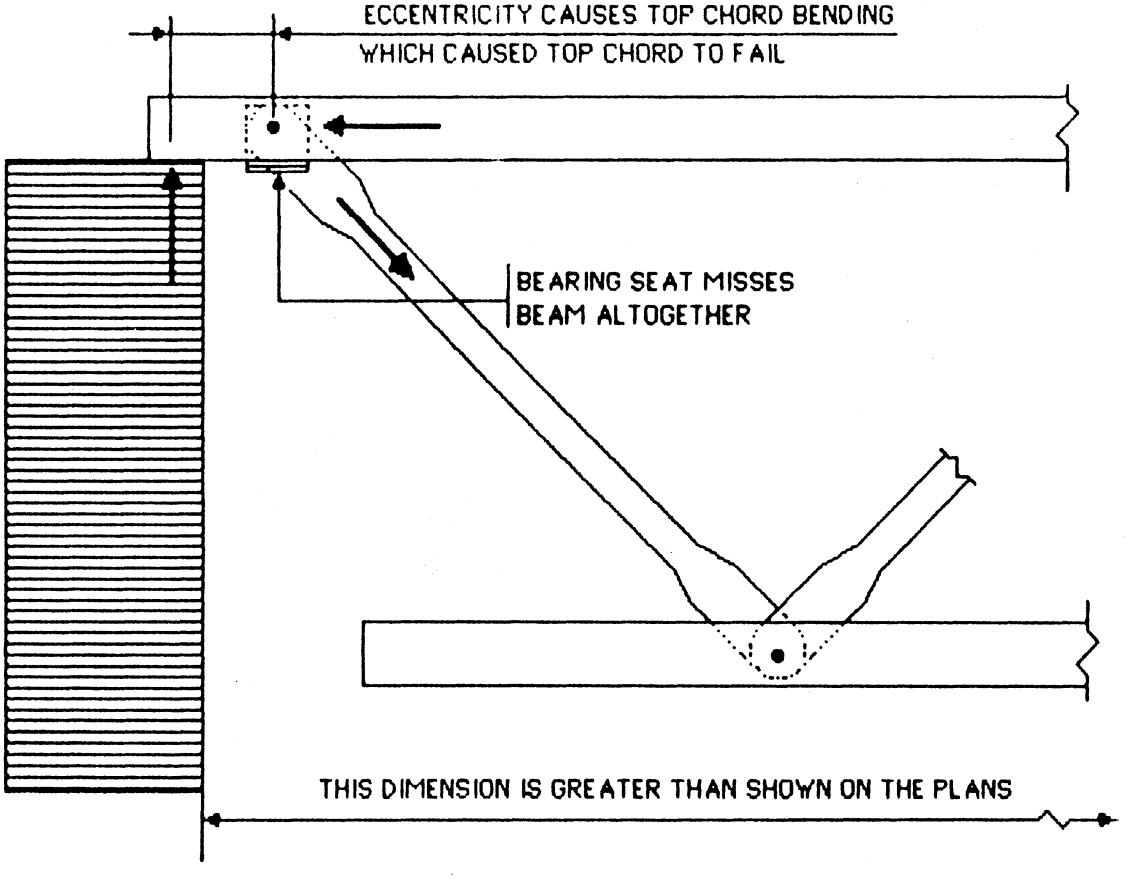
DESIGN LOAD

D.L. = 25 PSF
L.L. = 170 PSF
T.L. = 195 PSF

CLEAR DIMENSION BETWEEN FACES OF GLULAMS AS MEASURED IN THE FIELD — 17'-2½"



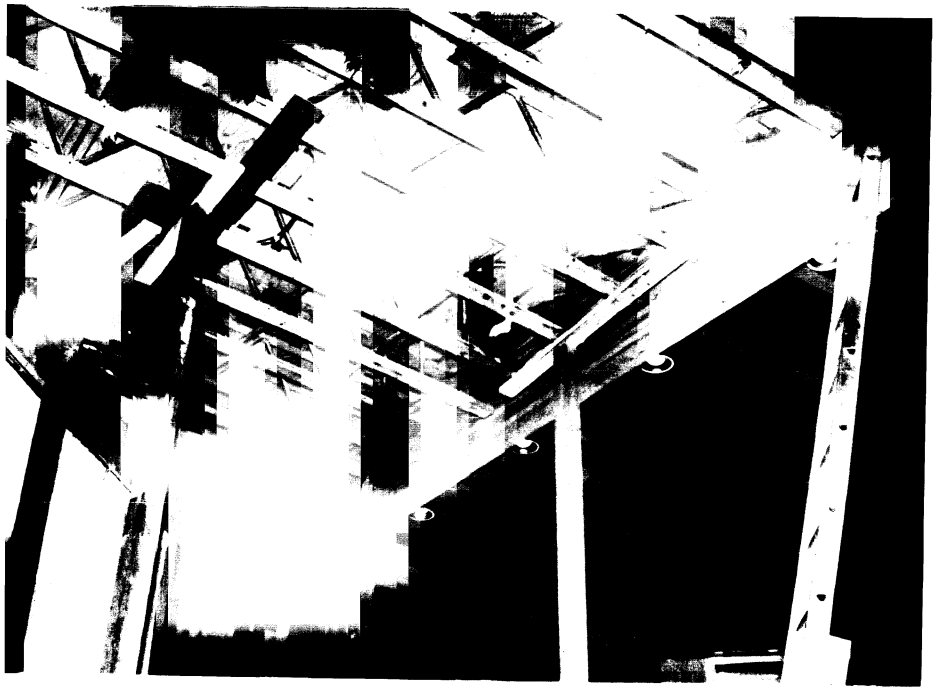
END DETAIL AS DESIGNED

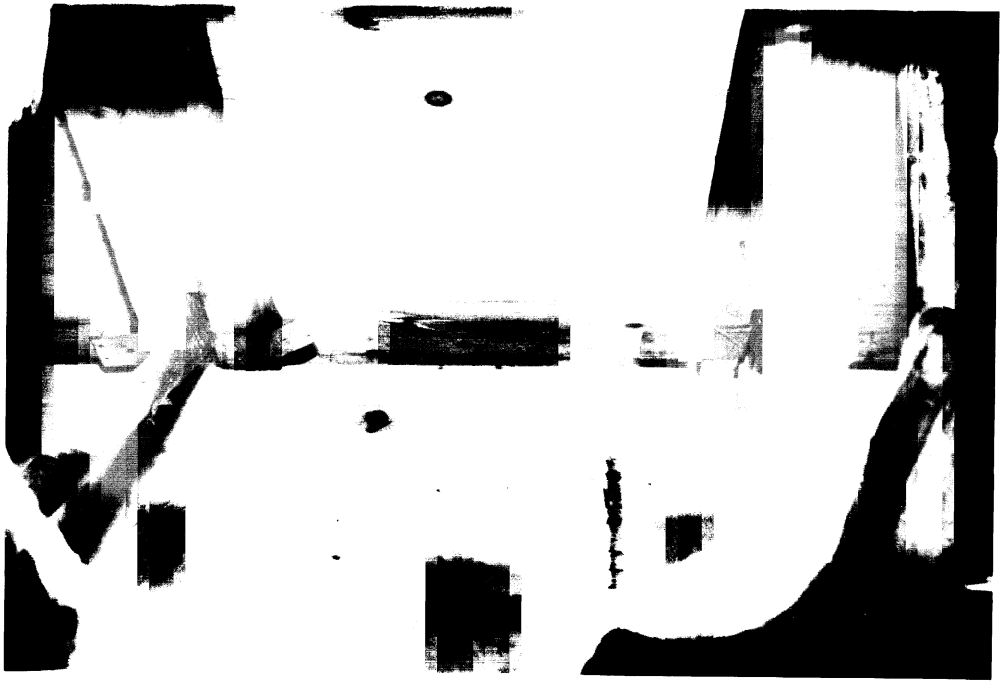


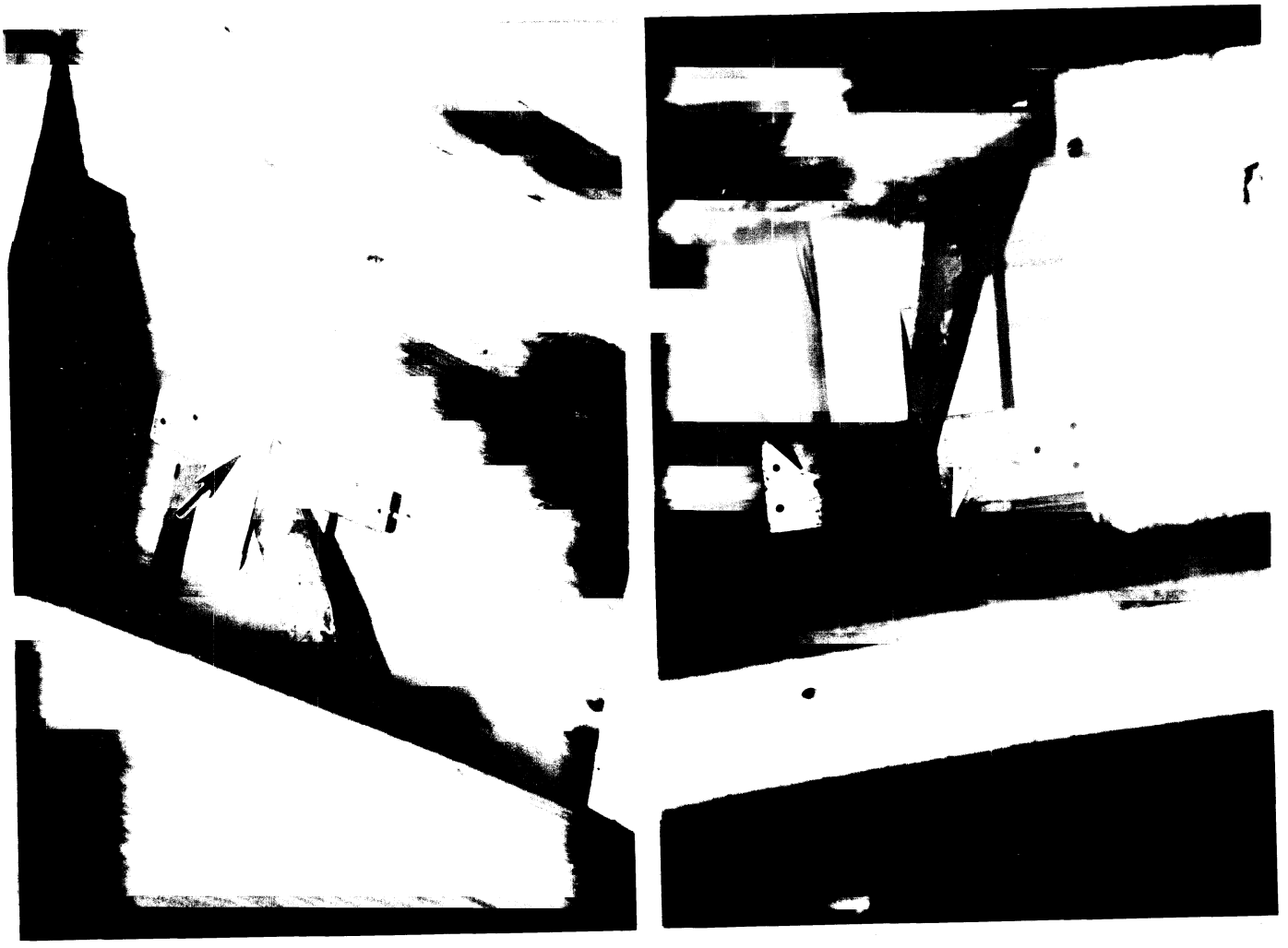
END DETAIL AS BUILT

DESCRIPTION OF PHOTOGRAPHS

Photo No.	Description
1.	View looking upward at the roof framing. The ceiling and insulation have been removed. Every Trus-Joist end failed where it was attached to the glulam beam which is shown. The roof sheathing acted as a suspension system and prevented a total collapse.
2.	This is a view looking parallel to the glulam beam which is shown on Photo 1. Each joist end has failed at the top chord end pin.
3.	This is a view of the condition at the opposite end of the joists shown on Photos 1 and 2. Some failures occurred at this end of the joists also. This joist end did not fail but it shows the condition of installation. The red arrow points to the steel bearing angle which did not bear on the glulam due to an excessive span between the glulams.
4.	This is a view of the condition at the opposite end of the joists shown on Photos 1 and 2. Some failures occurred at this end of the joists also. This joist end did not fail but it shows the condition of installation. The red arrow points to the steel bearing angle which did not bear on the glulam due to an excessive span between the glulams.
5. thru 9.	These is are views of typical ends which failed. The green arrows point to the pin locations in the top chord pieces which are still bearing on the glulam beam. The red arrows point to the pins which are still connected to a piece of the top chord which separated from the locations shown with the red arrows. The orange arrows point to the steel bearing angles which did not bear on the glulam beam.
10. and 11.	These are views in two of the other quadrants where there were no failures. The green arrows point to the steel bearing angles which do not fit the glulam beams as they should due to the increased clear span between the beams. The red arrows point to what appear to be the slotted wood plates which were provided by Trus-Joist.







ADDENDUM 2

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

PAUL LITCHFIELD, :

Plaintiff, :

VS. :

JERRY CUTSHAW, individually dba INTERIORS CONTRACTING, MAX J. SMITH, an individual, and MAX J. SMITH AND ASSOCIATES, INC., a Utah corporation, :

Defendants. :

MEMORANDUM DECISION

CIVIL NO. C 87-6238

Defendants' Motion to Dismiss was orally argued on the 10th day of December 1987. Plaintiff was represented by J. Mark Whimpey and defendants Interior Contracting, Inc. and Jerry Cutshaw were represented by Thomas R. Grisley. Defendants Max J. Smith and Associates, Inc. and Max J. Smith were represented by James A. Murphy. Defendants' motion was taken under advisement pending the filing of additional memoranda. The court after receiving the supplemental memoranda held an informal hearing with counsel in chambers. Counsel was advised orally of the court's decision and that a brief written Memorandum Decision would be mailed to counsel. Based on the foregoing the court renders the following decision.

The questions to be resolved in this case are whether or not the plaintiff is precluded from bringing this action pursuant to the provisions of 78-12-25.5 U.C.A. 1953 as amended and if said section is constitutional.

There is no dispute that the cabin that suffered a roof failure had been constructed and occupied for more than seven years and the complaint was not filed within the seven year statutory period.

Section 78-12-25.5 U.C.A. 1953 as amended reads as follows:

Injury due to defective design or construction of improvement to real property - within seven years.

> No action to recover damages for any injury to property, real or personal, or for any injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property more than seven years after the completion of construction.
>
> * * *
>
> (2) Completion of construction for the purpose of this act shall mean the date of issuance of certificate of substantial completion by the owner, architect, engineer or other agents, or the date of the owners use or possession of the improvement on the real property.
>
> The limitation imposed by this provision shall not apply to any person in actual possession and control as owner, tenant or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury for which it is proposed to bring in action.

> This provision shall not be construed as extending or limiting the periods otherwise prescribed by the laws of this state for the bringing of any action.

The language of Section 78-12-25.5 is rather ambiguous but the case of Good v. Christensen, 527 P2d 223 (Utah) attempts to interpret the language pertaining to the exception contained in said section.

According to the Good v. Christensen ruling the owner or person in actual possession cannot bring an action against the architect or contractor if more than seven years from the date of completion has expired. The net effect of this interpretation is that the potential liability for a dangerous condition of premises is left on the owner or the person in possession if injury is caused by circumstances that normally give rise to a cause of action.

The case of Salesian Society v. Formigli Corporation, 295 A.2d 19 (1972) cited by Justice Ellett in the Good v. Christensen case in support of the Utah Supreme Court's decision explains in greater detail the rational for the upholding a seven year statute repose and the reasons for such a statute being deemed constitutional.

The court concludes that the plaintiff's action be dismissed as against these defendants because of Good v. Christensen and for the reasons set forth in defendants' memorandum. However, the court believes that the plaintiff's case is not without merit. The court has reservations about its ruling but will

follow precedent of the present Utah case law.

Dated this 11 day of February, 1988.

JUDGE JOHN A. ROKICH

Copies mailed to counsel.

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

PAUL LICHTEFELD, Plaintiff, vs. JERRY CUTSHAW, individually and dba INTERIORS CONTRACTING, MAX J. SMITH, an individual, and MAX J. SMITH AND ASSOCIATES, INC., a Utah corporation. Defendants.	ORDER OF DISMISSAL RE: DEFENDANTS JERRY CUTSHAW, individually and dba INTERIORS CONTRACTING, MAX J. SMITH, an individual, and MAX J. SMITH AND ASSOCIATES, INC., a Utah corporation Civil No. C87-06238 Honorable John A. Rokich

The Court having heard Defendants' Motion to Dismiss on December 10, 1987 having reviewed the Memorandum in Support of Motion to Dismiss and the Supplemental Memorandum in the Court's file; having issued a Memorandum Decision dated February 11, 1988, and based upon the reasoning set forth in the Court's Memorandum Decision,

IT IS HEREBY ORDERED, ADJUDGED and DECREED:

Defendants' Motion to Dismiss is granted. Defendants, Jerry Cutshaw, individually and dba Interiors Contracting, Max J. Smith, an individual, and Max J. Smith and Associates, Inc., a Utah corporation. are

dismissed from the above-captioned matter, and Plaintiff's action against these Defendants is hereby dismissed with prejudice.

DATED this 8 day of March 1988.

BY THE COURT

/s/
John A. Rokich
District Court Judge

Approved as to Form & Content:

KIPP & CHRISTIAN

J. Mark Whimpey

mwl-f

ADDENDUM 3

Status as of July, 1988

State	Status	Statute	Case Law	Reasons
Ala.	Un Const.	7 & 23	291 S.2d 306 (1974)	can't have two subjects under one title
			313 S.2d 518 (1975)	vague
		6-5-218	435 S. 2d 727 (1983)	open courts
Alaska	Un Const.	09.10.055	752 P.2d 467 (1988)	equal protection
Arizona		No statute		just use general statute of limitations
Arkansas	Const.	37-237 (supp. 1983)	248 Ark. 1172, 455 S.W.2d 918 (1970), appeal dismissed, 401 US 901	
Cal.	Const.	337.15 337.1	581 P.2d 197 133 Cal. App. 3d 171, 183 Cal. R. 881 148 Cal. R. 219	
Colorado	Un Const. Const.	13-80-127(1)	494 F. Supp. 1334 (1980) 514 F. Supp. 1212 (1981) 655 P.2d 822 (1983)	equal protection
Conn.	Const.	52-584a	207 Conn. 496 (1988) 207 Conn. 599 (1988) 200 Conn. 562 (1986)	

Delaware	Const.	10 8127	489 A.2d 413 (1984) same case 462 A.2d 420	
Florida	Un. Const.	95.11(3)(C)	369 So.2d 572 (1979)	Open courts; Due Process
			413 So.2d 75 (1982), 451 So.2d 463	due process remanded
Georgia	Const.	9-3-51(a)(3) prior law was 3-1006	300 S.E.2d 507 (1983) 296 S.E.2d 579 (1982)	
Hawaii	Un Const.	657-8	514 P.2d 568 (1973)	equal protection
			647 P.2d 276 (1982)	equal protection
Idaho	Const.	5-241	644 P.2d 341 (1982)	
Illinois	Const.	110-13-214(a)	500 N.E.2d 69 (1986) 500 N.E.2d 34 (1986)	
	and		483 N.E.2d 613 (1985) 456 N.E.2d 353	
	Un Const. (prior law)		231 N.E.2d 588 (1967)	equal protection

Indiana	Const. statute is const. but old law is un const.	34-4-202	447 N.E.2d 622 (1983)	
Iowa	No challenge	614.1 (11)		
Kansas	No statute			use general statute of limitations 60-501
Kentucky	Un. Const.	413.135	497 S.W.2d 218 (1973) 704 S.W.2d 179 (1986)	due process special leg.
Louisiana	Const.	9.2772	366 So.2d 1381 (1978) 394 So.2d 822 (1981)	
Maine	No Challenge	14 752-A		
Maryland	Const.	5-108(b)	499 A.2d 178 (1985)	
Mass.	Const.	260 2B	437 N.E.2d 514 (1982) 506 N.E.2d 513 (1987)	

Michigan	Const.	27A. 5839	299 N.W.2d 336 (1980) 375 N.W.2d 397 (1985) 266 N.W.2d 795 (1978) 266 N.W.2d 850 (1978)	this case was reversed in 299 N.W. 2d 336. equal prot.
Minn.	Const. and un. Const.	541.051 amended in 1980 so now it const.	260 N.W.2d 548 480 F.2d 793 (1973) 318 N.W.2d 838 (1982)	equal prot.
Miss.	Const.	15-1-41	402 S.2d 320 (1981)	
Missouri	no challenge	516-097		
Montana	Const.	27-2-208 statute used to be 93-2619 & 93-2621	551 P.2d 642 (1976)	
Nebraska	Const.	25-223	404 N.W.2d 32 (1987) 279 N.W.2d 603 (1979) 335 N.W.2d 530 (1983) 321 N.W.2d 913 (1982)	

Nevada	Un. Const.	11.205	660 P.2d 998 (1983)	equal prot.
New Hamp.	Un. Const.	508:4-6	451 A.2d 174 (1982) 474 A.2d 566 (1984)	equal prot. equal prot.
New Jersey	Const.	2A: 14-1.1	295 A.2d 19 (1972) 306 A.2d 466 (1973) 293 A.2d 662	
New Mexico	Const.	37-1-27	645 P.2d 1375 (1982) 598 P.2d 218 568 P.2d 214 (1977)	raises due process concerns
New York	No statute architects, but has a general malpractice statute which governs negligence by professionals N.Y. Civ. Prac. § 214.6			
North Caro.	Const.	1-50(5)	286 S.E.2d 876 affirmed in part; rev. in part by 302 S.E.2d 868 (1983)	

North Dakota	Const.	28-01-44	384 N.W.2d 322 (1986) 420 N.W.2d 733 (1988)	case held a similar products liability statute unconst. as a violation of a equal protection
Ohio	Const.	2305.131	470 N.E.2d 950 (1984) 740 F.2d 1362 (1984)	
Okla.	Un. Const.	12 109	563 P.2d 143 (1977)	equal prot.
Oregon	Const.	12.135	491 P.2d 203 (1985)	
Pa.	Const.	42 5536 prior law 12 65.1	341 A.2d 184 (1975) 382 A.2d 715 434 A.2d 1243 (1981)	upheld prior law
Rhode Island	Const.	9-1-29	494 A.2d 543 (1985)	
South Caro.	Un. Const.	15-3-640	241 S.E. 739 (1978)	equal prot.

South Dakota	Const. and Un. Const. Repealed	15-2-9	349 N.W.2d 419 (1984) 716 F.2d 504 (1983) 320 N.W.2d 131 (1982) affirmed on re-hearing 325 N.W.2d 60 (1982)	open court
Tenn.	Const.	28-3-202	619 S.W.2d 522 (1981)	
Texas	Const.	5536a repealed; superseded by 16.008 & 16.009	663 S.W.2d 644 (1984) 695 S.W.2d 213 (1985) 731 S.W.2d 651 (1987) 618 S.W.2d 870 555 S.W.2d 145 743 F.2d 268 (1984) 726 F.2d 1069 (1984) 785 F.2d 1270 (1986) 696 S.W. 923 (1985)	
Utah	no challenge	78-12-25.5	564 P.2d 751 (1972) 607 P.2d 233 (1979) 603 P.2d 786 (1979) 359 P.2d 397 (1961) 642 P.2d 745 (1982)	

			681 P.2d 181 (1984) 527 P.2d 233 (1974) 717 P.2d 678 (1985) 743 P.2d 1196 (1987) 642 P.2d 745 (1982) 583 P.2d 77 (1978) 744 P.2d 1370 (1987)
Vermont	no statute (just use general statute of limitations 12 § 507 & 511)		
Virginia	Const.	8.01-250	371 F. Supp. 698 (1974)
Wash.	Const.	4.16.300	503 P.2d 180 695 P.2d 237 691 P.2d 188
W. Va.	no challenge	55-2-6a	
Wis.	Un Const. and new statute Const.	893-155 old law 893.89	259 N.W.2d 306 (1977) * 225 N.W.2d 454 (1975) * 272 N.W.2d 401 (1978) 331 N.W.2d 320 (1983) 301 N.W.2d 271 (1980) 293 N.W.2d 515 (1980)

* Equal protection (note-these cases struck down 893-155; a year later 893-155 was re-inacted, recently 893-155 was changed to 893-89. The courts have not ruled directly on the new law.

Wyo.	Un. Const.	1-3-111(a)	611 P.2d 821 (1980) 632 P.2d 925 (1981)	open court; equal prot. special laws
D.C.	Const.	12-310	637 F. Supp. 734 (1986)	

ADDENDUM 4

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ART. I, § 2 CONSTITUTION OF UTAH

Sec. 2. [All political power inherent in the people.]

All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require.

ART. I, § 11 CONSTITUTION OF UTAH

Sec. 11. [Courts open—Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

ART. VI, § 23 CONSTITUTION OF UTAH

Sec. 23. [Bill to contain only one subject.]

Except general appropriation bills, and bills for the codification and general revision of laws, no bill shall be passed containing more than one subject, which shall be clearly expressed in its title.

CONSTITUTION OF UTAH ART. I, § 24

Sec. 24. [Uniform operation of laws.]

All laws of a general nature shall have uniform operation.

ART. VI, § 26 CONSTITUTION OF UTAH

Sec. 26. [Enumeration of private laws forbidden.]

The Legislature is prohibited from enacting any private or special laws in the following cases:

1. Granting divorce.
2. Changing the names of persons or places, or constituting one person the heir-at-law of another.
3. Locating or changing county seats.
4. Regulating the jurisdiction and duties of Justices of the Peace.
5. Punishing crimes and misdemeanors.
6. Regulating the practice of courts of justice.
7. Providing for a change of venue in civil or criminal actions.
8. Assessing and collecting taxes.
9. Regulating the interest on money.
10. Changing the law of descent or succession.
11. Regulating county and township affairs.
12. Incorporating cities, towns or villages; changing or amending the charter of any city, town or village; laying out, opening, vacating or altering town plats, highways, streets, wards, alleys or public grounds.
13. Providing for sale or mortgage of real estate belonging to minors or others under disability.
14. Authorizing persons to keep ferries across streams within the State.
15. Remitting fines, penalties or forfeitures.
16. Granting to an individual, association or corporation any privilege, immunity or franchise.
17. Providing for the management of common schools.
18. Creating, increasing or decreasing fees, percentages or allowances of public officers during the term for which said officers are elected or appointed.

The Legislature may repeal any existing special law relating to the foregoing subdivisions.

In all cases where a general law can be applicable, no special law shall be enacted.

Nothing in this section shall be construed to deny or restrict the power of the Legislature to establish and regulate the compensation and fees of county and township officers; to establish and regulate the rates of freight, passage, toll and charges of railroads, toll roads, ditch, flume

78-12-25.5. Injury due to defective design or construction of improvement to real property — Within seven years.

No action to recover damages for any injury to property, real or personal, or for any injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property more than seven years after the completion of construction.

(1) "Person" shall mean an individual, corporation, partnership, or any other legal entity.

(2) Completion of construction for the purposes of this act shall mean the date of issuance of a certificate of substantial completion by the owner, architect, engineer or other agents, or the date of the owner's use or possession of the improvement on real property.

The limitation imposed by this provision shall not apply to any person in actual possession and control as owner, tenant or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury for which it is proposed to bring an action.

This provision shall not be construed as extending or limiting the periods otherwise prescribed by the laws of this state for the bringing of any action.

History: C. 1953, 78-12-25.5, enacted by L. 1967, ch. 218, § 1.

Meaning of "this act". — The term "this act," referred to in Subsection (2), means Laws 1967, Chapter 218, which appears as this section.

Cross-References. — Product Liability Act, statute of limitations, § 78-15-3.

Wrongful death, §§ 78-11-6, 78-11-7.